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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1965

No. 71

CONSOLIDATED
WITH No. 69

ROBERT N. HARDIN, Prosecuting Attorney for
the Seventh Judicial Circuit of Arkansas,
successor in office to Lawson E. Glover,
and JOHN W. GOODSON, Prosecuting At-
torney, for the Eighth Judicial Circuit
of Arkansas _____ *Appellants*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, MISSOURI PACIFIC
RAILROAD COMPANY, ST. LOUIS — SAN
FRANCISCO RAILWAY COMPANY, ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, and
THE TEXAS AND PACIFIC RAILWAY COMPANY — *Appellees*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF ARKANSAS

BRIEF FOR APPELLANTS

OPINION BELOW

Both the majority and the dissenting opinions of
the district court (R. 227-279, 279-283) styled as *Chicago,
Rock Island and Pacific Railroad Co., et al., v. Hardin,
et al., and Brotherhood of Locomotive Engineers, et al.*,
are reported at 239 F. Supp. 1 (E. D. Ark. 1965).

JURISDICTION

The judgment of the three-judge district court and injunction prohibiting enforcement of the two Arkansas statutes in controversy was entered on March 8, 1965. A notice of appeal was filed by the Prosecutors on April 1, 1965, on the authority of 28 U. S. C. §1253 (R.292). On March 27, 1965, Mr. Justice White ordered that the injunction of the lower court be stayed (R.294). On June 7, 1965, probable jurisdiction was noted and this appeal was consolidated with an identical appeal of the Brotherhoods from the same cause (R.296).

QUESTIONS PRESENTED

I. Has the Congress of the United States intended by the enactment of Public Law 88-108 to pre-empt the State of Arkansas and responsible State officials from enforcing Act 116 of 1907 and Act 67 of 1913 and to deprive the State of Arkansas of its authority to legislate matters of safety in the railroad industry in the form of crew consist statutes?

II. Whether an actual conflict or inconsistency exists between the Arkansas Acts in controversy, enacted for the safety and protection of the people of Arkansas, and Public Law 88-108 which requires and has resulted in arbitration of labor disputes of Railroad Management and the Brotherhoods?

III. If Public Law 88-108 nullifies conflicting Arkansas Statutes or merely suspends and prohibits the enforcement of those Statutes for the duration of the National Arbitration and Awards made pursuant to Public Law 88-108?

CONSTITUTIONAL PROVISION INVOLVED

The application of the Supremacy Clause, Article VI of the United States Constitution is in issue in this appeal.

UNITED STATES STATUTE INVOLVED

This case involves the application of Public Law 88-108, 77 Stat. 132 (1963), 45 U.S.C.A. §157 (Supp. V. 1964). This Statute is set out at pages 76 through 78 of the printed record.

ARKANSAS STATUTES INVOLVED

This litigation also involves Act 116, Acts of Arkansas of 1907, codified as Ark. Stat. Ann. §§ 73-720 through 73-722 (1947), and Act 67, Acts of Arkansas of 1913, appearing at Ark. Stat. Ann. §§ 73-726 through 73-729 (1947). These two statutes were attached to the original complaint as exhibits and are found at pages 22 through 24 of the printed record.

STATEMENT

This litigation originated in the United States District Court for the Western District of Arkansas pursuant to the authority of 28 U.S.C. §§ 1331, 1332, 2201 and 2202. On April 10, 1964, a detailed and carefully designed complaint was filed by six large interstate railroads, the appellees here but identified hereafter as the Railroads, against two prosecuting attorneys whose districts encompassed the area where the railroad lines operated. The complaint attacked the validity of two enactments of the General Assembly of Arkansas, Act 116 of 1907 and Act 67 of 1913, which are commonly known and referred to as "full crew" statutes. Act 116 requires that freight trains with certain exceptions shall only be operated with a minimum crew consisting of an engineer, a fireman, a conductor and three brakemen. Similarly, Act 67, enacted in 1913, with certain exceptions, requires that switching operations in cities of first and second class shall only be conducted with a minimum crew of an engineer, fireman, foreman, and three helpers.

Specifically, it was alleged that the two Arkansas statutes were an improper regulation of commerce, constituted a denial of equal protection of the law and comprised a deprivation of property without due process. It was further asserted that the Arkansas statutes had been pre-empted by the enactment of Public Law 88-108. A three-judge court was empaneled in accordance with 28 U.S.C. § 2281.


Thereafter, on motion five national operating unions of the railroad industry, referred to in this brief as the Brotherhoods, were given leave to intervene. The Attorney General for the State of Arkansas, acting throughout this litigation on behalf of the original de-

fendants, which will be noted subsequently as the Prosecutors, and employed counsel of the Brotherhoods filed separate answers to the complaint. These responses each denied the essential and material allegations of the complaint and affirmatively contended that the Arkansas statutes were constitutional and valid (R.28 and 32).

The Brotherhoods then, without the participation of the Prosecutors, moved to dismiss the complaint on the primary proposition that the issues had been previously adjudicated in favor of the constitutionality of the Arkansas statutes. This application was denied. Certain preliminary discovery procedures were then instituted by the Brotherhoods in preparation of the evidentiary hearing on the merits. On October 17, 1964, appellee filed a motion for a summary judgment (R.40, 41). In support of the motion fourteen exhibits were submitted (R.43-224). The main thrust of the motion was that Public Law 88-108 had superseded the Arkansas statutes, but it was also alleged that the Arkansas statutes were discriminatory and denied appellees equal protection of the law. The Prosecutors responded to the motion (R. 225) and separate briefs were filed by each of the three litigants.

On March 5, 1965, the district court rendered its decision. While all of the three judges agreed that there were substantial factual issues in controversy concerning the Railroads' allegations of discrimination and equal protection, the two district judges concluded that Public Law 88-108 was in conflict with the two Arkansas consist laws. It was accordingly held that the state laws were superseded. Judgment was entered on March 8, 1965, for the Railroads and the Prosecutors were enjoined from enforcement of the Arkansas statutes (R.284, 285). The dissenting circuit judge found no discernable conflict

between the federal and state enactments and held that no substantial evidence could be discovered to require pre-emption of the Arkansas Statutes by Public Law 88-108.

An application by the Brotherhoods to the district court to stay the injunction was unanimously denied (R.288). After separate appeals had been filed in the district court (R.287 and 292), a stay of the injunction was ordered by Mr. Justice Byron R. White pending the decision of this Court upon jurisdictional aspects of the case (R.294). An effort to modify the order was denied on April 2, 1965. Finally, probable jurisdiction was noted on June 7, 1965, and the appeals of the Prosecutors and the Brotherhoods were consolidated for argument and consideration (R.296). 

SUMMARY OF ARGUMENT

I

The Congress of the United States Did Not Intend to Deprive the Several States of Their Authority to Legislate and Establish Minimum Railroad Crew Compositions in Certain Prescribed Circumstances.

A. *The Police Power Authority of the States Occupies a Preferred Status.*

The authority of the state to legislate for the health, safety and welfare of the general public is a well-established principle. *Terminal R.R. Ass'n v. Brotherhood*, 318 U.S. 1 (1943). The inherent police power of every state is an indispensable essential attribute of sovereignty. It rests to a large extent on the maxim, "*salus populi suprema lex.*" *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U.S. 1 (1896).

The history of the litigation challenging the two Arkansas statutes in controversy here is most persuasive and confirms the preferred status of inherent state police power authority. Act 116 was determined to be valid under an attack of unconstitutional regulation of commerce, a denial of equal protection and deprivation of property without due process. *Chicago R.I. & Pac. R.R. Co. v. Arkansas*, 219 U.S. 453 (1911). Similarly, two years later Act 67 also withstood a challenge of invalidity. *St. Louis and I. M. and So. Ry. v. Arkansas*, 240 U.S. 518 (1916). Both of these full crew statutes were tested again on identical contentions and, in addition, were alleged to have pre-empted by the enactment of the Interstate Commerce Act and the Railway Labor Act. *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1931); see also *Missouri Pac. R.R. v. Norwood*, 290 U.S. 600 (1933).

The legislative bodies are peculiarly able and purposely adapted to be knowledgeable and competent to express the will of their people and enact proper and remedial legislation.

There is a strong presumption in favor of the validity of state statutes. Where there are two apparent conflicting statutes, the courts have traditionally made every effort to construe them in *pari materia*. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). When considering the validity of a law, the reviewing court will properly refrain from evaluating the wisdom or expediency of the statute and will confine examination to the narrow constitutional issues involved. *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960).

Just as other laws require continued scrutiny and supervision, the statutes and regulations directed to the safe operation of railroad traffic undergo enactment, alteration and repeal as circumstances and conditions demand. Although the legislatures, the electorate, and state courts have reconsidered the efficacy of state railroad minimum crew consists, this does not infer that more stringent requirements are not necessary in other states or that any state should be deprived of the authority to re-enact new regulations when deemed justified.

B. *The Application and the Implications of Public Law 88-108 and the Award Were Expressly Limited.*

All should concede that Public Law 88-108 was enacted to compel compulsory arbitration to circumvent a nationwide strike. The Congress made every effort in the

drafting and enactment of Public Law 88-108 to avoid any possible conflict with state minimum crew statutes. The legislative history is decidedly in favor of the proposition that the state statutes were intended to remain in full force and effect.

If a controversy does exist as to the application of the Award in regard to state crew consist laws, pre-emption by implication is contrary to the weight of authority. *California v. Zook*, 336 U.S. 725 (1949); 1 *Southerland Statutory Construction*, § 2026.

It is also clear from the record that the parties bound by the Award were limited to certain participating carriers and unions. Public Law 88-108, § 1; (R.76); *In Re Certain Carriers*, 229 F. Supp. 259 (D.C. 1964). It must be emphasized that no state received an invitation or participated in the arbitration. Also, it may be granted that safety was a factor to be considered by the Arbitration Board and that special boards of adjustment were convened, but under the circumstances these bodies could not satisfy the unique demands of safety in the various states.

II

No Genuine Conflict of Inconsistency Exists Between the Arkansas Acts in controversy and Public Law 88-108.

There is no actual inconsistency existing either in Acts 116 or 67, enacted for the safety and protection of the people of Arkansas, and Public Law 88-108 which required and resulted in arbitration of work rule differences between railroad management and the brotherhoods.

The Congress of the United States may, in its discretion, exercise complete authority of a subject of interstate commerce. *Gibbons v. Ogden*, 9 Wheat. 1 (1924). Both federal and state statutes may operate and govern the same issue so long as the presence of the latter does not frustrate the operation and objectives of the former. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). In the absence of a clear manifestation of legislative purpose, the federal enactment must be so comprehensive as to be incompatible with the local law before the state statute will be superceded. *Local 20 v. Morton*, 377 U.S. 252 (1964). Hence, affirmance of the district court's decision must rest on the foundation that Public Law 88-108 has so substantially occupied the field of minimum railroad crews as to override all state statutes on the subject. But the spirit of the Award does not prohibit the employment of additional trainmen that might be required by state statutes or the desire of railroad management. Likewise, both Act 116 and Act 67 are directed to minimum crew schedules deemed necessary for the safety and welfare of the railroad employees and the general public as well.

Excluding the decision of the district court, the Prosecutors have been unable to discover any judicial decision which holds that arbitration between unions and management acts to nullify state statutes and is binding on the state.

III

*If State Crew Consist Statutes Have Been Suspended,
it is Only For the Duration of the National Award.*

Should this Court determine that Public Law 88-108 and the awards made thereunder must pre-empt state full crew statutes, then the Prosecutors urge reversal

of the district court's judgment holding that the pre-empted statutes would not be revived at the termination of the Arbitration Award.

The great weight of legal precedent is in favor of the proposition that a pre-empted law is revived at the conclusion of the life of the superseding authority. *Tua v. Carriere*, 117 U.S. 201 (1886); 1 *Southerland Statutory Construction*, § 2027. The Award was to terminate within two years after its enactment and was to give only temporary relief to the work rules controversy.

The district court held that the objectives of Public Law 88-108 would be frustrated by reinstatement of state crew consist laws upon the expiration of the Award. However, as a practical matter revival of state statutes could not offer any conflict after the Award had expired. The majority of the district court was convinced that state full crew statutes restrict collective bargaining rights that were granted by the Railroad Labor Act. This conclusion ignores the fact of past successful collective bargaining practices in Arkansas. The reasoning of the district court which would incorporate Public Law 88-108 as a part of the Railroad Labor Act possesses as much merit today as it did in 1931 when an almost identical contention was rejected. *Missouri Pac. Ry. v. Norwood*, *supra*. Finally, it is laudable to protect the uninterrupted flow of transportation in interstate commerce in the national public interest but how this goal will be enhanced by the absence of state crew laws is not explained. The only way to prohibit future railroad labor management controversies would be to maintain perpetual compulsory arbitration and this was exactly what the Congress intended to avoid.

ARGUMENT

I

The Congress of the United States Did Not Intend to Deprive the Several States of Their Authority to Legislate and Establish Minimum Railroad Crew Compositions in Certain Prescribed Circumstances.

A. *The Police Power Authority of the States Occupies a Preferred Status.*

The authority of a state to legislate for the health, safety and welfare of the general public as a legitimate exercise of police power is a long established and fundamental principle. *Reid v. Colorado*, 187 U.S. 137 (1902); *Terminal R.R. Ass'n v. Brotherhood*, 318 U.S. 1 (1943). This authority is qualified, of course, by a criteria of reasonableness and must not run afoul of or conflict with constitutional provisions and prohibitions. *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945); *Savage v. Jones*, 225 U.S. 501 (1912). The police power is said to be indispensable, essential attribute of sovereignty found in every civilized government. *Geurin v. Little Rock*, 203 Ark. 103, 155 S.W. 2d 719 (1941). It rests to a large extent on the maxim, "*salus populi suprema lex*". *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U.S. 1 (1896), affg. 121 Mo. 298, 24 S.W. 591. The extent of this power or an attempt to define its outer limits is fruitless for each case must turn on its own facts. *Berman v. Parker*, 348 U.S. 26, at 32 (1954). Hence, a statute may be constitutional on its face but unreasonable and oppressive and therefore unconstitutional in its application. *Cf. Pennsylvania R.R. Co. v. Driscoll*, 330 Pa. 97, 198 A. 130 (1938) reversed 336 Pa. 310, 9 A. 2d 621 (1939).

The right to legislate and govern was placed in each sovereign state. The founders of this nation, in their wisdom recognized that each geographical and political area was best able to diagnose and prescribe for its own ills. The citations found throughout this brief emphasize the fact that many states have enacted varied safety regulations and particularly minimum crew laws governing the railroad industry.

The history of the litigation challenging the two Arkansas statutes in controversy here is most persuasive and confirms quite dramatically the preferred status of inherent state police power authority. Act 116 was determined to be valid under an attack of unconstitutional regulation of commerce, a denial of equal protection, and deprivation of property without due process. *Chicago R.I. & Pac. R.R. Co. v. Arkansas*, 219 U.S. 453 (1911). Similarly, two years later Act 67 also withstood a challenge of invalidity. *St. Louis and I. M. and So. Ry. v. Arkansas*, 240 U.S. 518 (1916). Both of these full crew statutes were tested again on identical contentions and, in addition, were alleged to have pre-empted by the enactment of the Interstate Commerce Act and the Railway Labor Act. *Missouri Pac. R.R. v. Norwood*, 283 U. S. 249 (1931); see also *Missouri Pac. R.R. v. Norwood*, 290 U.S. 600 (1933).

It is recognized and accepted that the mere fact that the state legislation involves an area of interstate commerce does not, in itself, invalidate the enactments.

The different provisions of statutes, the many judicial pronouncements and other matters prominent in the history of minimum railroad crew requirements have not resulted from either zealous legislatures or careless

tribunals. On the contrary, the propriety and validity of governmental regulations are founded upon compelling logic and reason which have been critically surveyed from every corner and defies criticism. Some states may have little or no railroad traffic while others may have their entire economy bound by an immense railroad complex of mileage and traffic. Severe or moderate weather may be a substantial factor of consideration. Both terrain and density of population deserve prominent attention. Even past evils, death and disaster may prompt governmental inquiry and legislative action. Both the safety of the railroad employee and the general public must each be weighed. The legislatures are assuredly aware of the number of jobs, the benefits of creating a healthy atmosphere for the continued growth of the railroad industry and the profits of stockholders. However, the general welfare of the entire community is the compelling accomplishment which is sought to be obtained. In all of these matters of consideration previously mentioned and others too numerous to relate, the legislative bodies of the several states are peculiarly able and purposely adapted to investigate, be knowledgeable, and competent to express the will of their people and enact proper and remedial legislation. It is against this background that state statutes not only are benefited by a presumption of validity but also occupied a favored status. Both the state and federal judiciary have adhered to the principle that where a statute is susceptible of two interpretations, one valid and the other invalid, that of validity will be adopted and where there are two apparent conflicting statutes, every effort will be made to construe in *pari materia*. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). Finally, it is understandable that reviewing courts have properly refrained from evaluating the wisdom or expediency of the statute under consideration, but confine their examination to the nar-

row constitutional issues involved. *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960).

Just as other laws require continued scrutiny and supervision, the statutes and regulations directed to the safe operation of railroad traffic undergo new enactment, alteration and repeal as circumstances and conditions demand. The activity of several states in the past few years confirms that the legislatures, the electorate, and state courts have for undisclosed reasons reconsidered the efficacy of state railroad minimum crew consists. This does not infer, however, that more stringent requirements are not necessary in other areas or that those states should be deprived of the authority to re-enact new regulations when deemed justified.

B. The Application and the Implications of Public Law 88-108 and the Award Were Expressly Limited.

Although the circumstances and conditions underlying the railroad-labor dispute which culminated in the enactment of Public Law 88-108 were meticulously reviewed in the opinion of the court below (R.239-248), it is necessary, in order to gain proper perspective of the questions involved in this cause, to briefly review those most significant events once again.

It is too clear to be misinterpreted that the President of the United States, by his message of July 22, 1963 (Pl. Ex. 1; R.43-45), was compelled to recommend drastic action in the form of compulsory arbitration by the unfruitful and disappointing efforts failing to resolve a labor dispute of national magnitude and importance. (See appendixes to Message, R.59-74, and Pl. Ex. 2, "Report of the Presidential Railroad Commission, Washington, D. C., February 1962" which accompanies the

printed record for further historical background.) The singular purpose sought to be served was avoidance of a nationwide strike which would have paralyzed or at least crippled the entire economy by submission of work rule disputes to the Interstate Commerce Commission (R.48).

One significant alteration of the mechanics of operation as proposed by the President was made by the Congress. This change is particularly important to this litigation because it is most indicative of the fact that every precaution was made by the Congress to avoid any possible conflict with state enacted minimum crew statutes. The suggestion by President Kennedy that the Interstate Commerce Commission be employed as the vehicle to receive, assimilate, and resolve work rule changes caused much consternation in the Congress. It was contemplated that these changes would be disseminated in the form of regulations of the Commission. When this prospect was discussed in the Congress some grave doubt was expressed, or at least some anticipation, that state enacted minimum crew statutes were susceptible to cancellation if they were thought to be in derogation of the regulations promulgated by the Commission. Rather than hazard this risk, all references to the I.C.C. in the proposed joint resolution was omitted and substituted in its place was the creation of the Arbitration Board. As finally enacted, the command of Public Law 88-108 was concise and unambiguous. It may be unequivocally stated that the attainment of equitable and enforceable work rules which precipitated the legislative scheme and the end result were entirely consistent. Neither the statement of the President nor Public Law 88-108 contained any language that dictated, or even suggested, abolition of state enacted minimum crew laws. Only the true source of difficulty, the proposed work rule changes were identified.

The opinion of the neutral members of Arbitration Board No. 282 stated the problem:

"We have been asked to decide only two issues which separate the parties: the so-called 'fireman (helper)' issue and the so-called 'crew consist' issue" (R.97).

The fact that the crew consist issue is not synonymous with state enacted crew laws is evident by the later comment:

"All citizens must join in the hope that failures of leadership — on either side — will not again make it necessary for the government to do for the parties what the parties should do for themselves" (R.97).

It may be argued that safety was an expressed factor to be considered by the Arbitration board. Award (R. 82). Perhaps the Board did abide by this admonition, but it must be recognized that local circumstances and conditions are so varied that it would be indeed fanciful, in absence of some expression of direction, to conclude that the Board seriously entertained the thought, much more embarked on a program, to occupy every facet of local full crew requirements. Moreover, the comments of the members of the Board support the conclusion that state laws were not the target of their efforts. The neutral members phased the restrictions by this language:

"Though our authority comes from Congress, the issues we must decide were framed by the parties, and the scope of our action cannot exceed the scope of the actions which the parties themselves might have taken with respect to these issues had they been able to reach agreement. There

are many questions of general social policy, community action, or legislation which bear on the problems before us, but they are not within our purview" (R.97).

A satisfactory answer is not found in the provision for special boards of adjustment. Award, Part C — Guidelines (R.92-94). The eleven listed general considerations together with ten additional particular considerations seem to approach some adequate criteria for compulsory arbitration of work rules. But when weighed on a scale for safety and welfare of the general public, the results are not so gratifying. In the instance under consideration, three special boards were assembled, each composed of the same three members (Pl. Ex. 5; R.174-202). A huge geographical area was designated as their responsibility. In the report, special considerations in Arkansas were limited to a switchyard in Paragould (R. 182-185) and the observation that a switchyard at Little Rock was automated (R.199). This is hardly an acceptable response to the question of safety in Arkansas for it cannot be validly presumed that, with the exception of Paragould and Little Rock, the balance of Arkansas is consistent with the national equation of safety. These patent deficiencies require the conclusion that except for the most general guides of safe railroad operation, both the Congress and the Arbitration Board intended and thought that all special problems would be left, as had been before, in the capable hands of the respective state governments.

Most indicative of all to the Prosecutors, there exists in the Award those provisions granting railroad management certain discretion in fixing the size of crews in excess of the prescribed award. Likewise, the local union chairman is granted authority to add, under certain cir-

circumstances or at his pleasure, Additional crewmen up to 10 percent in excess of the Award (Award, II B (2); R. 83). Perhaps the latitude conceded to management and labor can be adequately described as gratuities, but little comfort can be gleaned where there exists only a hap-penstance relationship to safety. Such circumstances speak most forcefully that Arbitration Board No. 282 was only seeking to compromise and revise work rule difficulties rather than supplant various state regulations and statutes. Armed with such abbreviated facts and no pretence of knowledge of local conditions and special problems, little more could reasonably be asked of the Board. Uniformity may be a desirable foundation for collective bargaining arrangements, but the superior dictates of safety cannot be made a slave of unanimity.

The legislative history is decidedly in favor of the proposition that the state statutes were to remain in full force and effect. See Hearings on H.J.Res. 565 (Railroad Work Rules Dispute), 88 Cong., 1st Sess. 78; Hearing on S.J.Res. 102 (Railroad Work Rules Dispute), 88th Cong., 1st Sess. 400. A search of the published hearings reveals that perhaps there were only two or three instances where expressions were made to the contrary. Hearings H.J.Res. 565, 88th Cong., 1st Sess., pp. 111-114; hearings before Senate Committee on Commerce on H.J.Res. 565, pp. 400-401. Conceding *arguendo* that a controversy may have existed as to the impact of Public Law 88-108 on state crew consist laws, pre-emption by implication is contrary to the weight of authority. *E.g.*, *California v. Zook*, 336 U.S. 725 (1949); *Schwartz v. Texas*, 344 U.S. 199 (1952); 1 *Southerland Statutory Construction*, § 2026.

Arbitration Board No. 282 was convened, and made the Award pursuant to the congressional mandate. See *Brotherhood of Locomotive Firemen v. Chicago, B. & O. R.R. Co.*, 225 Supp. 11 (D.D.C. 1964), Affmd., 331 F. 2d 1020 (D.C.Cir. 1964, cert. den., 377 US. 918 (1964)). Their investigative data was to be furnished by the Secretary of Labor. Public Law 88-108, § 3 (R.77). One railroad yard in Chicago was visited for the purpose of orientation (R.81).

It is apparent from the record in this cause that no state official participated or was appointed to the Board. If it had been the purpose and objective of Public Law 88-108 to furnish an absolute national scheme to supersede state statutes and regulations, then most reasonably, interested and vital state commissions, agencies and departments would have been consulted. From this point alone it appears that the Board was ill-equipped and uninformed to accomplish nothing more than mediation of the disputed work rule changes causing the labor-management conflict. It is remarkable that even this was accomplished within the ninety day limitation imposed by Congress. Public Law 88-108, § 5 (R.77). Certainly a larger more intricate task could not be concluded in such a perfunctory time.

The majority of the court below relied substantially on the decision of *In Re Certain Carriers*, 229 F. Supp. 259 (D.C. 1964) where it was stated at 260:

“The Award is final and binding on both sides and must be obeyed by all parties.”

It is well at this juncture to determine just who composed the parties to the Award. It is noted at Section 1 of Public Law 88-108:

“That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices” (R.76).

Further identification of those parties is found in the Award of Arbitration Board No. 282 (R.80). There, the carriers are named as “Certain Carriers Represented by the Eastern, Western, and Southeastern Carriers’ Conference Committees”. The brotherhoods involved are the same as those composing the appellants in case No. 69 who intervened when this suit was instituted in the district court. It is conclusive then that no state or responsible organism of any state was a participating party. This might be unavailing as it was ignored by the district court. However, coupling this factor with the disclosure that several major railroad carriers were not involved in or bound by the Award and that the Award may be extended, terminated or altered only by agreement of the participating unions and carriers the true significance of the entire legislative scheme to circumvent a nationwide strike which was drawing dangerously near is brought once again sharply into focus. This conclusion is also supported by several questions which demand response. What has happened to full crew legislation in those states where there were no participating carrier lines? Were those statutes pre-empted? If no crew consist acts were in force at the time of the Award are the states prohibited from enacting minimum consist laws in the future? If the parties to the Award may consummate other agreements, is it possible for car-

riers not participating in the Award to agree to different provisions than those contained in the Award? In other words, if the Award is to be applied uniformly, as the majority opinion of the lower court suggests will only those carrier and unions bound by the Award dictate to other carriers what provisions should be contained in the work rules? If so, is this not an unusual reward for the carriers who possessed "leadership" reaching satisfactory agreements with the brotherhoods and so did not desire to serve notices or participate in the Award? Finally, would Congress impose upon the several states such an imperfect and unstable device in the place of state authority to enact necessary and reasonable crew laws? In spite of all this, the lower court said the objective of Public Law 88-108 was to insure a preferred national policy of uniformity when uniformity could not possibly result by design but only by accident.

While on the subject of uniformity, one further discrepancy must be noted. Of course, the object of the Railroads' complaint was relief from the "intolerable burdens" of Act 116 and Act 67. However, no challenge was made of Act 298 of 1909, codified as Ark. Stat. Ann. §§ 73-723 — 73-725 (1947). This enactment is an essential part of the statutory full crew compliment in Arkansas. It is provided by Ark. Stat. Ann. § 73-723 that:

"No railroad company or officer of court, owning or operating any line or lines of railroad in this State, and engaged in the transportation of passengers over its line or lines, shall equip any of its said passenger trains with a crew consisting of less than an engineer, a fireman, a conductor, a porter and a flagman or brakeman, except as hereinafter provided."

There is then excepted from the operation of the Act railroad companies with lines less than 100 miles in length and passenger trains consisting of less than three cars. Act 298 Section 3, Acts of Arkansas 1909. The Award itself makes no distinction of freight or passenger service except at Part C—Guidelines where particular considerations are set forth for the benefit of special boards of adjustment (R.92, 93). It might easily be assumed that Act 298 of 1909 is likewise pre-empted by Public Law 88-108 and the Award, but the carriers agreed to comply with passenger train complement (R.100). Still Act 298 remains in an attitude of legal limbo. It will be interesting, to say the least, to rationalize the propriety of Act 298 in conjunction with Act 67 concerning the switching of passenger trains in cities of the first and second class. The Award is simply incapable of being transformed to supplant state crew consist laws.

II

No Genuine Conflict of Inconsistency Exists Between the Arkansas Acts In Controversy and Public Law 88-108.

The Prosecutors maintain that there is no actual inconsistency existing either in Acts 116 or 67, enacted for the safety and protection of the people of Arkansas, and Public Law 88-108 which required and has resulted in arbitration of work rule differences between railroad management and the brotherhoods.

It is conceded that the Congress of the United States in its discretion may validly exercise complete authority over a subject of interstate commerce. *Gibbons v. Odgen*, 9 Wheat 1 (1924); U.S. Const. Art. I. § 8; *Virginia Ry. v. Federation*, 300 U.S. 515 (1936). It may be granted

that both federal and state statutes may operate and govern the same issue so long as the presence of the latter does not frustrate the operation of the former. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). An earnest effort has been made at the initial topic in this brief to demonstrate that Public Law 88-108, the National Award, and legislative history all confirm an intent not to supersede state full crew laws. Even this record as presently constituted is replete with expressions on the part of Congress not to pre-empt state minimum crew laws. It is recognized that in the absence of a clear manifestation of legislative purpose, the federal enactment must be so comprehensive as to be incompatible with the local law before the Supremacy Clause will be invoked to supercede the conflicting statute. *Local 20 v. Morton*, 377 U.S. 252 (1964). Hence, in this case, affirmance of the lower court's decision must rest on the foundation that Public Law 88-108 has completely or so substantially occupied the area of minimum railroad crews as to override all state statutes on the subject.

Such an adversity was urged by the Railroads in the district court to have created sort of a theoretical concept of jeopardy. The majority of the district court accepted the proposition finding an irreconcilable conflict and adjudged that the Railroads could not comply with the Award while abiding by the requirements of the Arkansas crew consist statutes (R.270). It is submitted that this proposition is untenable. The conflict is more apparent than real and more contrived than believed. It must be reiterated that the National Award provided for arbitrary changes of the work rules which prohibits the unions from insisting on greater job compliments through collective bargaining. The spirit of the arbitration does not prohibit the employment of additional trainman that might be required by state statutes or the desire of rail-

road management. In fact, it is incomprehensible to believe that this interpretation would possibly violate the Award.

Likewise, both Act 116 and Act 67 are directed to minimum crew schedules deemed necessary for the safety and welfare of the railroad employees and the general public as well. Specific provisions are allowed for additional crewmen. See Exhibits "A" and "B" to complaint, Act 116 of 1907, R.22, and Act 67 of 1913, R.23. They leave for railroad management or traditional collective bargaining negotiation the ultimate determination of road, yard or switching crew composition in excess of the statutory minimum.

The lack of depth to the theory of incompatibility is revealed by the two-year termination period provided by Public Law 88-108 (§§ 4 and 8; R.77, 78). The district court held that the expiration of the award would not revive the state statutes or provide the states with new authority to enact new statutes. It is understood that at the conclusion of the compulsory arbitration period, the unions and the carriers will be free to negotiate further. There is no assurance, however, of what standards will be used. Furthermore, the Award itself and the entire legislative arbitration complex, can be altered or terminated any time by the agreement of the parties. Hence, even if it may be presumed that the Board, as originally constituted, was concerned with at least the fundamental aspects of railroad safety, which undoubtedly was directed more to the benefit of employees than the general public, this concern, after the expiration of the Award, is to be substituted by purely economic factors, self-help, and collective bargaining. Under these circumstances, it is obvious that the safety and welfare of

the national public, if important at all initially, will be relegated to a merely ancillary position in connection with the negotiation and settlement of labor contracts.

Excluding the decision of the district court, the Prosecutors have been unable to discover any other judicial decision which holds that arbitration between unions and management acts to nullify state statutes and is binding on a state.

III

*If State Crew Consist Statutes Have Been Suspended,
it is Only for the Duration of the National Award.*

Should this Court determine that Public Law 88-108 and the Awards made thereunder must pre-empt state full crew statutes, then the Prosecutors urge reversal of the district court's judgment holding that the pre-empted statutes would not be revived at the termination of the Arbitration Award.

It is believed that the basis of the decision of the district court is not only void of supporting legal authority, but lacks logic and reasoning as well. The great weight of legal precedent is decidedly in favor of the proposition that a pre-empted law is revived at the conclusion of the life of the superseding authority. *Tua v. Carriere*, 117 U.S. 201 (1886); 1 *Southerland Statutory Construction* § 2027.

The conclusion that the Award was only to last for a two year period is inescapable, but the majority of the court below refused to recognize the plain limitation of Public Law 88-108, stating:

"When the uncontroverted facts as reflected by the record before the court are considered, the court is convinced that the purpose and intent of Congress in enacting Public Law 88-108 would be frustrated by reinstatement of state crew consist laws upon the expiration of the awards, which would occur on May 6, 1966."

• • • • •

"Without doubt, it was contemplated and provided that any changes made thereafter in crew consists would be governed by collective bargaining conducted pursuant to the procedure prescribed by the Railway Labor Act. That Act protects and promotes collective bargaining, *California v. Taylor, supra*, and supersedes state laws that restricted the collective bargaining rights that were granted and recognized by the Railway Labor Act."

• • • • •

"Not the least of the court's consideration is the substantial public interest involved relative to the uninterrupted and orderly flow of goods in interstate commerce as well as the necessity for an efficient and orderly railway transportation system as part of the national defense effort. (See Letter Advisory Opinion from General Counsel of the Department of Defense Joint Resolution Committee, U.S. Code Cong. and Adm. News, 1963, p. 842, which states that any interruption in rail service would severely impair the defense effort.)" (R.273).

The decision of the district court has no relation, and is in fact adverse to, the original scheme announced by President Kennedy in the message of July 22 where he stated:

" . . . For a 2-year period during which both the parties and the public can better inform them-

selves on this problem and alternative approaches — interim work rule changes proposed by either party to which both parties cannot agree should be submitted for approval, disapproval or modification . . . ” (R.48).

Neither can the decision find any support in the provisions of Public Law 88-108. The specific interim application is expressed in plain terms at Section 4, where it is provided:

“The Award shall continue in force for such period as the arbitration board shall determine in its award, but *not to exceed two years* from the date the award takes effect, unless the parties agree otherwise.” (Emphasis added.) (R.77).

Finally the results of the efforts of Arbitration Board No. 282 makes the definite and unequivocal statement at IV of the Award that:

“This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise” (R.95).

What seems most important of all, the decision of the majority below while seeking to accomplish laudable ends has created utterly ludicrous results. Without being so presumptuous as to speculate on “the multitude of conflicts” (R.275), a reasonable interpretation of the decision of the lower court seems founded upon three primary considerations: (1), it is stated that Public Law 88-108 would be frustrated by reinstatement of state crew consist laws upon the expiration of the Award; (2), the superseded state laws restrict collective bargaining rights that were granted and recognized by the Railroad Labor Act; and, (3), revival of the several state laws would interrupt the orderly flow of goods in interstate commerce (R.273).

Just how these goals will be secured or be enhanced by the absence of state crew laws is unexplained. As to the initial contention it must be observed that the purpose and intent of Congress in enacting Public Law 88-108 could not be frustrated by reinstatement of state minimum crew laws after expiration of the awards simply because there would be no federal statute or Award. The district court would by judicial fiat extend both Public Law 88-108 and the Award where Congress has expressed a contrary intention. Second, existence of state crew consist statutes would not in the future restrict the collective bargaining rights anymore than they have in the past. In this regard it is imperative to keep foremost that it was the "anachronistic" work rules, not the full crew laws, which were the source of the dispute and condemned by the neutral members of Arbitration Board No. 282 (R.128). In view of the past successful collective bargaining practices in Arkansas, and apparently no unusual difficulty has been encountered in other states having full crew regulations, it would seem that the district court's fear of prohibition of extant mediation procedures is totally unfounded. A vain effort to incorporate the entire scheme of Public Law 88-108 and the resulting Awards as a part of the Railway Labor Act seems fruitless indeed in view of the total lack of substance to this proposition. The reasoning of the district court possesses as much merit today as it did in 1931 when an almost identical contention was rejected in *Missouri Pac. Ry. v. Norwood*, *supra*. The final reason expressed by the district court can be disposed of just as effectively as the previous two grounds. Here, the basis of the complaint sounds in the national public interest of the uninterrupted flow of transportation in interstate commerce. But it would seem that the only way to prohibit future railroad labor-management con-

flicts would be to maintain perpetual compulsory arbitration; not abolition of full crew laws. Of course, a permanent machinery for continued compulsory arbitration was exactly what the Congress intended to avoid. See *Senate Hearings*, 460, 397; 109 *Cong. Rec.* 15892 (1963); 109 *Cong. Rec.* 15960 (1963).

One final aspect remains for comment. As noted previously, the application of Public Law 88-108 was expressly limited by Section 1 to those carriers and labor organizations that had served notices pursuant to the Railway Labor Act (R.76). To reiterate, the resolution expired 180 days after the date of its enactment (§ 8, R. 78) and the Award is to expire within two years after it takes effect "unless the parties agree otherwise." Public Law 88-108, § 4 (R.77); Award, IV (R.95).

Couched in this composure this is the result of the district court's decision: State authority to enact full crew laws have been forever withdrawn in preference of certain carriers' and labor unions' joint agreement to extend or make alternative work rules under a law that will expire at a particular time and in favor of future collective bargaining arrangements which may be dictated by any number of unforeseen circumstances.

The Prosecutors refuse to accept the proposition that the Congress intended to create such chaos.

CONCLUSION

This litigation has been revealed to be extremely important to the State of Arkansas and to each of the states as well. This is just as true irrespective of the presence of current full crew statutes or regulations, for if the decision of the lower court is affirmed, each state will be deprived of its traditional and established authority to enact reasonable safety regulations applicable to the railroad industry. This police power is a precious requisite to enable each state to discharge its obligations for the health, safety, and welfare of its citizens. If the decision of the district court is affirmed a dangerous precedent will be set threatening virtually every aspect of state governmental authority which touches with a concurrent area of federal involvement.

It is therefore urged that in recognition of the several established principles recited by the Prosecutors, the decision of the court below be reversed.

Respectfully submitted,

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